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NO. 92-479

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

TXO CORPORATION,

Petitioner,

v.

ALLIANCE RESOURCES CORP.;
TUG FORK LAND COMPANY;
GEORGE KING; AND
GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

BRIEF OF THE ALABAMA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

BRUCE J. MCKEE
Hare, Wynn, Newell & Newton
P. O. Box 830663
Birmingham, AL 35283-0663
(205) 328-5330

Counsel for *Amicus Curiae*

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QUESTIONS PRESENTED

Amicus curiae Alabama Trial Lawyers Association will respond to the *amicus curiae* brief of the Business Council of Alabama, filed in support of Petitioner, and will address the following issues:

(1) WHETHER THE AMOUNTS OF POST-*HASLIP* PUNITIVE DAMAGES VERDICTS IN ALABAMA ARE JUSTIFIED BY THE PARTICULAR FACTS, AND, THEREFORE, ARE NOT VIOLATIVE OF DUE PROCESS.

(2) WHETHER THE ANECDOTAL STATISTICS AND LISTS OF ALABAMA VERDICTS IN THE *AMICUS CURIAE* BRIEF OF THE BUSINESS COUNCIL OF ALABAMA ARE INACCURATE AND MISLEADING.

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1 Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* §2.2(A)(1), p. 24
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INTEREST OF AMICUS CURIAE

The Alabama Trial Lawyers Association is a group of over 1300 Alabama lawyers, most of whom primarily represent individuals who have been injured or harmed through the fault of others. The Alabama Trial Lawyers Association is the only organization in the State of Alabama which, through litigation, appeals, and *amicus curiae* briefs, seeks to protect the rights of average, ordinary Alabama citizens. The benefits to those Alabama citizens of the availability of punitive damages (e.g., punishment and deterrence) would be severely diminished by a constitutionally-mandated "cap" on the amount of punitive damages. Moreover, this amicus is uniquely situated to respond to the allegations about Alabama verdicts contained in the amicus curiae brief of the Business Council of Alabama in support of Petitioner.*

*Pursuant to Rule 37, letters of consent have been filed with the Clerk of Court.

SUMMARY OF THE ARGUMENT

In support of Petitioner, the *amicus curiae* brief of the Business Council of Alabama asserts Alabama courts are not applying the standards set out in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), and punitive damages have reached "epidemic proportions in Alabama." (BCA *amicus* brief p. 3). In support of that drastic declaration, the Business Council of Alabama presents this Court with an anecdotal list of verdicts, a discussion of a few cases in the brief, and an appendix of verdicts which contains major errors and is misleading — especially in that it includes verdicts rendered under Alabama's unique "punitive damages only" wrongful death statute. Furthermore, the few case examples discussed by the Business Council of Alabama are presented in a misleading manner in that the Business Council failed to disclose the egregious conduct of the respective defendants which led the juries to award substantial punitive damages in those cases.

This *amicus* asserts a maximum "cap" on amounts of punitive damages verdicts, such as a mathematical ratio relative to compensatory damages, would neutralize the protection of the general public currently provided by the deterrence and punishment features of punitive damages. The determination of the *amount* of punitive damages appropriate in a given case — subject to judicial review — should remain with the finder of fact. The amount deemed necessary to punish a particular wrongdoer, and to deter that wrongdoer and others similarly situated, will vary widely from case to case depending on such factors as anticipated profitability of the wrongful conduct, the degree of reprehensibility, the frequency of similar past conduct, the degree of harm or likely harm, and wealth of the perpetrator. *See Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986). A mathematical "cap" inhibits use of these important social variables. Importantly, no "cap" is required by Due Process.

I. "EXCESSIVENESS" IS A RELATIVE TERM: THE COMPLETE FACTS OF A PARTICULAR CASE MUST BE CONSIDERED.

The *amicus* brief of the Business Council of Alabama argues the unconstitutionality of punitive damages by, primarily, listing merely the *amounts* of some randomly - collected verdicts. However, the principal point of the majority opinion in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), is that "excessiveness" is judged on a case-by-case basis, with consideration given to: frequency of past misconduct; degree of reprehensibility; potential profitability of the wrongful conduct; and financial position of the defendant. 111 S.Ct. at 1044-45. These factors necessarily vary considerably from one case to another.

The *amicus* brief of the Business Council of Alabama fails to aid this Court in that the "worst-case scenario" verdicts it discusses omit any discussion of the facts on these factors. On the other hand, consideration of the facts in those cases reveal the verdicts to be rationally based and within the state's goals for such damages.

II. THE PURPORTED DATA ABOUT ALABAMA VERDICTS CONTAINED IN THE AMICUS BRIEF OF THE BUSINESS COUNCIL OF ALABAMA ARE INACCURATE AND MISLEADING.

A. *The Particular Alabama Case Examples of Supposedly Excessive Verdicts Omit the Pertinent Facts of Egregious Wrongdoing.*

As an example of what it terms "unbridled jury discretion," page 5 of the Business Council's brief describes the $4 million dollar verdict in *BMW of North America, Inc. v. Gore* (pending in Alabama Supreme Court, Nos. 1920324 and 1920325). The distortion in the Business Council's brief is that it would have this Court believe the *sole* ground for the $4 million verdict was that Gore suffered paint defect dam-

ages of only $4,000. The *full* story is that plaintiff proved BMW's board adopted a corporate policy in 1983 of not disclosing to consumers such damages in its "new" cars. In *Gore*, plaintiff proved BMW made $4 million dollars by its fraudulent scheme. Thus, the punitive damages verdict in *Gore* did nothing more than to remove the wrongful profit from BMW's pockets. Furthermore, the *Gore* case is a perfect example of the efficacy of punitive damages: five days after this verdict was returned in Birmingham, Alabama, BMW's board met in New York and voted to rescind its policy and to, from now on, disclose *all* damages to consumers. Moreover, in a similar case, *Yates v. BMW of North America, Inc.* (pending in the Alabama Court of Civil Appeals, No. 2910714), plaintiff presented evidence BMW failed to disclose damages in almost 6000 cars, and such damage devalued the resale value of such cars by about 10%. At approximately $4,000 per car, that amounts to a wrongful profit to BMW of $24,000,000. Would a punitive verdict predicated only upon the out-of-pocket losses of the car owner ($4,000) have changed BMW's corporate policy?

At pages 5-6, the Business Council refers to the $25 million dollar verdict in *Northwestern Mut. Life Ins. Co. v. Sheridan* (pending in the Alabama Supreme Court, No. 1911110). The statement at page 6, that Northwestern offered refunds when it "found the problem" is seriously misleading. (The "problem" is illustrated by the facts in this case: agent Behr sold the Sheridans a retirement plan, but he pocketed most of the premium and actually ordered only some small insurance policies, which the Sheridans did not want and did not know about.) The evidence disclosed numerous co-workers of the "bad" agent (Behr) had complained to Northwestern management *for years* that he was stealing from clients and committing other frauds. The company intentionally ignored the problem because the agent was a top producer. Furthermore, prior to being hired by Northwestern, Behr had been sued 16 times in two years, had several judgments recorded against him, and had 171 judgments recorded against Behr's, Inc.,

his alter ego. Northwestern knew Behr's application was false, approved him anyway, yet it asserted to the State of Alabama it had investigated Behr and found him in good business standing. While in Northwestern's employ, a federal judge found Behr violated the federal odometer fraud statute, and Northwestern knew about this. Northwestern also knew Behr was forging client names and addresses — yet it did nothing. It was only *after* the *Sheridan* case that Northwestern sought out other defrauded policyholders and offered any compensation. There was evidence that the pension plan stolen from the Sheridans would have been worth approximately $1 million at retirement. In this case, the jury awarded *$800,000 in compensatory damages*, and Northwestern did not raise any issue with that finding in its briefs to the Alabama Supreme Court. Even if the Alabama Supreme Court affirms the full $25,000,000 punitive damages verdict, the sum represents less than four-days' profit for the defendant.

At pages 6-7, the Business Council discusses Alabama wrongful death cases. It is misleading to lump the total of wrongful death verdicts in with "regular" punitive damages in support of an argument that Alabama punitive damages verdicts are excessive. Alabama has a uniquely "punitive damages only" wrongful death statute. Although denominated "punitive," Alabama wrongful death damages are of a different and unique character. For example, in arriving at the verdict the jury is allowed to take into account the fact *a* human life has been taken (but not the specific value of the particular victim). *Atkins v. Lee*, 603 So.2d 937, 942 (Ala. 1992). For federal income tax purposes, Alabama wrongful death damages are treated as untaxed personal injury damages. *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986). Other distinctions are outlined in the dissenting opinion in *Geohagan v. General Motors Corp.*, 291 Ala. 167, 176-83, 279 So.2d 436 (1973).

At page 6, the Business Council cites the wrongful death case of *General Motors Corp. v. Johnston*, 592 So.2d 1054 (Ala. 1992), evidently as an example of an unconstitutionally exces-

sive judgment ($7.5 million). In *Johnston*, a seven-year-old was killed when his grandfather's brand new pick-up truck suddenly stalled and was struck and crushed by a tractor trailer truck. The evidence established GM knew a defective part could cause its vehicle to stall. Nevertheless, GM intentionally concealed the fact from the public because a recall would have cost approximately $42,000,000. An analysis of the "*Haslip* factors," 592 So.2d at 1060-64, easily supports this judgment amount.

B. *The Appendix of Alabama Verdicts Contains Inaccuracies and Is Misleading, e.g., in That the List Includes Verdict Amounts from Cases Tried under Alabama's Unique Wrongful Death Statute.*

Appendix B to the Business Council's brief should be treated as no more than what it is: one person's unscientific collection of verdicts. Space does not allow - nor is it necessary to this brief's point — a line-by-line listing of inaccuracies in the appendix. Suffice it to say there are several. And, as partially admitted by the Business Council, the appendix does not disclose the amounts actually paid, if any, in these cases. Even where the appendix states the case was reversed, or new trial ordered, the total of the original verdict is used to bolster the argument of excessiveness. Many of the appended verdicts were compensatory damages. Thus, the list, and the figures, are untrustworthy.

Following is a list of a few of the errors in Appendix B:

(1) The following cases, as evidenced by published Alabama Supreme Court opinions, involve *only compensatory damages*, and no punitive damages at all: *Pacifico v. Jackson*, 562 So.2d 174 (Ala. 1990) (p. 12a of Appendix B); *Alabama Power Co. v. Foster*, 555 So.2d 174 (Ala. 1989) (p. 16a); *Ensor v. Wilson*, 519 So.2d 1244 (Ala. 1987) (p. 20a); and *Davison v. Mobile Infirmary*, 456 So.2d 14 (Ala. 1984), and 518 So.2d 675 (Ala. 1986) (p. 22a). Thus, there is absolutely no excuse for including these $13,150,000 in verdicts in the appendix. Furthermore, the opinion in *Barclay Int'l Inc. v. First Alabama Bank of Montgomery*, 557 So.2d 1201 (Ala. 1989) (p. 15a), indicates the $1,800,000 verdict is all compensatory. The $5,000,000 in *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987) (p. 20a), appears unlikely to include any punitive award because the Court held plaintiff adequately proved $20 million of lost profits for breach of contract. Many of the unreported verdicts are referred to as medical malpractice cases; it is unlikely these cases involve any punitive damages. Other unreported cases are listed as personal injury — one can speculate they were compensatory verdicts, too.

(2) In *Delchamps v. Morgan*, 601 So.2d 442 (Ala. 1992) (p. 5a) (a $500,000 verdict), the punitive damages count was reversed *and rendered.*

(3) In *Lowery v. Osmond*, (p. 5a), the trial court granted JNOV for the defendant and *the plaintiff* has appealed. Similarly, in *Garner v. City of Opp* (p. 10a), *the plaintiff appealed* from a reduction of the verdict down to $100,000.

(4) In *Harris v. M & S Toyota, Inc.*, 575 So.2d 74 (Ala. 1991) (p. 9a) ($500,000 verdict), the Alabama Supreme Court affirmed the trial court's *granting of defendant's motion for new trial.*

(5) *Alabama Power Co. v. Beam*, 472 So.2d 619 (Ala. 1985) (p. 23a), is a wrongful death case.

(6) *Enstar Group, Inc. v. Grassgreen*, 1993 WL 33533 (M.D. Ala. Feb. 9, 1993) (p. 3a), remitted the punitive award to $10 million.

WITH SUCH BLATANT INACCURACIES, THE ARGUMENTS OF THE BUSINESS COUNCIL OF ALABAMA SHOULD BE DISREGARDED IN THEIR ENTIRETY.

III. THIS COURT'S OPINION IN *HASLIP* ADEQUATELY PROTECTS DEFENDANTS' DUE PROCESS RIGHTS; AND AN ABSOLUTE MATHEMATICAL RATIO "CAP" ON PUNITIVE DAMAGES AMOUNTS WOULD VITIATE THE DETERRENCE AND PUNISHMENT GOALS OF PUNITIVE DAMAGES.

The primary purposes of punitive damages are punishment of the wrongdoer for "outrageous conduct" and "to deter him and others like him from similar conduct in the future." *Restatement of Torts* (Second) §908(1) (1979). *See also*, 1 Linda L. Schlueter and Kenneth R. Redden, *Punitive Damages* §2.2(A)(1), p. 24 (2d ed. 1989). "[T]he jury has the constitutional authority to determine what amount, if any, of punitive damages is necessary to punish a defendant for wrongful conduct and to deter future conduct of a like nature. The common law assigned this function to the jury. *Barry v. Edmunds*, 116 U.S. 550, 5 S.Ct. 501, 29 L.Ed. 729 (1886)." *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878, 884 (Ala. 1991).

This Court has often recognized the historic function of the jury to determine the amount of punitive damages. See, for example, *Molzof v. United States*, 112 S.Ct. 711, 715-16 (1992); and Justice Scalia's concurring opinion in *Haslip*, 111 S.Ct. at 1054. T. Sedgwick, On the Measure of Damages 20 (6th ed. 1874), stated "[t]he measure of damages, being in most cases entirely blended with the questions of fact, must have been from the outset left with the jury."

Being a fact question, the Business Council of Alabama is incorrect to assert the Supreme Court of Alabama errs when it gives some deference to the *fact-finding* of the jury, when considering the factors relevant to punitive damages. This Court's opinion in *Haslip* strikes an appropriate constitutional balance between the due process rights of defendants and the goals of states in allowing punitive damages. The Court also acknowledged the role of the judiciary in reviewing the amount of a verdict (a fact-finding function of the common law jury). This *amicus* vehemently disagrees with the Business Council of Alabama and asserts Alabama courts are

very conscientious in their application of the "*Haslip* factors." The fine print of the Business Council's own appendix evidences many instances of reduced or reversed verdicts.

This *amicus* asserts the Alabama Supreme Court was correct in *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377-78 (Ala. 1989):

> The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit. We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case. Discretion tolerates elasticity, but the jury's discretion is by no means unbridled. The "whims" of any given jury are still harnessed by the authority of the trial court and appellate courts.
>
> Could a convicted criminal argue a due process violation just because a jury in a neighboring county had recently acquitted an accused on virtually indistinguishable facts?

The Business Council of Alabama advocates the very type of "mathematical bright line" rejected by the majority opinion in *Haslip*. 111 S.Ct. at 1043. It is perfectly obvious why business would advocate such a "cap:" a ratio rule would allow potential defendants to calculate their exposure in advance, and to factor it in to the costs of doing business. Any such ratio "cap" would greatly diminish the punishment and deterrence purposes of punitive damages. "The threat of a punitive verdict that corporate planners cannot calculate with precision is a powerful incentive for corporations to avoid deliberate or reckless misconduct in violation of the state's substantive law. To impose limits on punitive damages would allow corporations to treat them as another cost of doing business." Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 Emory L. J. 303, 326 (1991).

This Court's opinion in *Molzof v. United States*, 112 S.Ct. 711 (1992), stresses the primary focus on punitive damages is upon the conduct of the defendant rather than the amount of compensatory damages proved by the plaintiff. The Court said:

> "[A] jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181 (1852). . . .
>
> "By definition, punitive damages are based upon the degree of the defendant's culpability." [citations omitted]. The common law definition of "punitive damages" focuses on the nature of the defendant's conduct.

112 S.Ct. at 715-16.

On remand from this Court, the Supreme Court of Georgia correctly reasoned: "Because deterrence is based on factors other than the actual harm caused, we rejected the notion that punitive damages must necessarily bear some relationship to the actual damages awarded by the jury." *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501, 502-03 (1991). The Supreme Court of Alabama has also noted, "[t]he essential purpose of punitive damages would be thwarted if we required that they conform to any mathematical equation." *Associates Financial Services Co. of Alabama, Inc. v. Barbour*, 592 So.2d 191, 199 (Ala. 1992). In another case, that Court further explained:

> A constitutionally permissible punitive damages award against a wealthy defendant, who engages in egregious conduct that fortuitously does little real harm but has the potential to do great harm, might involve a greater ratio of punitive damages to compensatory damages than that in this case. In contrast, a constitutionally permissible punitive damages award against a poor defendant, whose reckless conduct causes great actual harm but has little potential to cause other harm, might require a lower ratio of punitive to compensatory damages than that in this case. We find no compelling reason to set an arbitrary mathematical relationship between compensatory and punitive damages. Imposing such a relationship would inevitably result in injustices, and we decline to impose it.

Southern Life and Health Ins. Co. v. Turner, 586 So.2d 854, 858 (Ala. 1991). *See also Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1499 (8th Cir. 1992), citing *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988) ("an inflexible ratio that focuses on plaintiff's injury rather than of defendant's wrongdoing fails to accomplish the purpose of punitive damages"); *Crookston v. Fire Insurance Exchange*, 871 P.2d 789 (Utah 1991) (any mathematical cap or ratio defeats the purposes of punitive damages); and *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991).

CONCLUSION

This *amicus curiae*, the Alabama Trial Lawyers Association, urges the Court to affirm the judgment of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

Bruce J. McKee
Hare, Wynn, Newell & Newton
P. O. Box 830663
Birmingham, AL 35283-0663
(205) 328-5330

Counsel for *Amicus Curiae*

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